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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-399

CINCINNATI BENGALS, INC., and
CHARLES "BOOBY" CLARK,
Petitioners,

vs.

DALE HACKBART,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet.App. A1-A20)[1] is reported at 601 F.2d 516 (10th Cir. 1979). The opinion of the United States District Court for the District of Colorado ("The District Court") (Pet.App. A21-A35) is reported at 435 F.Supp. 352 (D.Colo. 1977).

1. "Pet.App." refers to Petitioners' Appendix.

JURISDICTION

The judgment of the Court of Appeals was entered on June 11, 1979. The Petition for Writ of Certiorari was filed within 90 days of that date. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

QUESTIONS PRESENTED

1. Whether the Court of Appeals decision conflicts with controlling state law and statutes of limitations applicable to this case.

2. Whether the Court of Appeals decision demonstrates such a complete misapprehension of the trial court proceedings and such a departure from the usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

3. Whether the Court of Appeals adopted a standard of relevance under the Federal Rules of Evidence which is clearly erroneous and which indicates a serious misunderstanding of the trial court proceedings.

STATUTES INVOLVED

Colo. Rev. Statutes §13-80-102:

Actions barred in one year. All actions for assault and battery, false imprisonment, slander, and libel shall be commenced within one year after the cause of action accrues, and not afterwards.

Colo. Rev. Statutes §13-80-110:

Actions barred in six years. Except as otherwise provided in section 4-2-725, C.R.S. 1973, the following

actions shall be commenced within six years after the cause of action accrues, and not afterwards:

(a) All actions of debt founded upon any contract or liability in action;

(b) All actions upon judgments rendered in any court not being a court of record;

(c) All actions for arrears of rent;

(d) All actions of assumpsit, or on the case founded on any contract or liability, express or implied;

(e) All actions of waste and for trespass upon land;

(f) All actions of replevin, and all other actions for taking, detaining, or injuring goods or chattels;

(g) All other actions on the case, except actions for slander and for libel.

COUNTER-STATEMENT OF THE CASE

On September 16, 1973, the Cincinnati Bengals played the Denver Broncos in the opening game of the National Football League season. Dale Hackbart, a defensive back for the Broncos, was assigned to "cover" Charles Clark, a Bengals running back, on a Bengals pass play. When the pass was thrown toward Clark, a Broncos player intercepted and began running upfield. At that point, the offensive and defensive roles of Hackbart and Clark changed. Hackbart became an "offensive" player whose responsibility was to block Clark and prevent him from tackling the Broncos ball carrier; Clark, on the other hand, was obliged to "ward-off" Hackbart's block and attempt to tackle the Broncos player running upfield.

As a result of an attempt to block Charles Clark in the end zone, Dale Hackbart fell to the ground. He

then turned and, with one knee on the ground and the other leg extended, watched the play continue upfield. A few second later, Charles Clark came from behind and struck the neck and base of skull of Dale Hackbart with his fist and forearm.

Dale Hackbart subsequently filed suit against the Bengals and Charles Clark for injuries allegedly received in the 1973 Broncos-Bengals game. Jurisdiction of the District Court was invoked pursuant to 28 U.S.C. §1332, on diversity of citizenship grounds.

The District Court, after dismissing Plaintiff's claim for assault and battery, elected to hear the case on Plaintiff's theory that the acts of the Defendant constituted reckless misconduct within the principles of Section 500 of the Restatement (Second) of Torts. The trial of the case was bifurcated by agreement of the parties, and the District Court, acting without a jury, held a full evidentiary hearing on the issue of liability.

The District Court resolved the liability issue in favor of the Cincinnati Bengals and Charles Clark. The District Court concluded that professional football is a species of warfare and that so much force is tolerated and the magnitude of the force exerted is so great that injuries are not actionable in Court, that even intentional torts are beyond the scope of judicial process. The District Court held that Dale Hackbart had assumed all risk of injury regardless of the circumstances of its causation and that the judicial system was not an appropriate forum to seek redress for such otherwise tortious conduct.

On appeal, the Tenth Circuit Court of Appeals reversed the District Court and remanded the case for a new trial. The Court of Appeals rejected the District Court's conclusion that in a professional football game, an injury, which

is inflicted by one football player on an opposing player, cannot give rise to liability in tort where the injury was inflicted by the intentional striking of a blow during the game. The Court of Appeals reasoned that while a professional football player consents to physical contacts consistent with the understood rules of the game, he does not consent to aggravated fighting in the athletic arena beyond the rules or usages of the game.

ARGUMENT - REASONS FOR DENYING THE WRIT

1. The Court of Appeals Decision Is Entirely Consistent With Controlling Law in Colorado and Applicable Statutes of Limitations.

Petitioners argue that the District Court and the Court of Appeals failed to apply the appropriate statute of limitations. The fundamental question in the determination of the appropriate statute of limitations is whether the Respondent's cause of action properly states a claim for reckless misconduct within the principles of Section 500 of the Restatement of Torts, Second.

The District Court elected to hear the case on the theory of reckless misconduct and applied the six-year limitations period applicable to tort actions generally, as set forth in Colo. Rev. Statutes §13-80-110. Petitioners argue that the District Court never reached the statute of limitations issue. This argument is manifestly inaccurate. In the District Court opinion, written by the Honorable Richard P. Matsch, the Court expressly rejected the one-year limitation period for assault and battery claims set forth in Colo. Rev. Statutes §13-80-102. *Hackbart v. Cincinnati Bengals, Inc.*, 435 F.Supp. 352, 355 (D. Colo. 1977). In proceeding on Respondent's reckless misconduct theory, the District Court stated that such a claim was a recognized

tort action in the State of Colorado (citing *Fanstiel v. Wright*, 122 Colo. 451, 222 P.2d 1001 [1950]) and that such type of claim was not barred by the one-year statute of limitations. *Id.* at 355.

At the appellate level Petitioners again argued that the one-year assault and battery limitations period was controlling. The Court of Appeals, Doyle J., responded that the case had been appropriately characterized as an action for reckless misconduct, and that under such characterization, the six-year limitation period applicable to tort actions generally was appropriate. *Hackbart v. Cincinnati Bengals, Inc.*, 601 F.2d 516, 525 (10th Cir. 1979).

Petitioners' discussion of *Maes v. Tuttoilmondo*, 31 Colo. App. 248, 502 P.2d 427 (1972), is inapposite. The *Maes* case is distinguishable in its facts. In *Maes*, the Plaintiff was struck several times in the back of the head with a sawed-off pool cue following a verbal altercation in a bar. In the above case, the Defendant proceeded in his attack with a specific intent to injure the Plaintiff. In the case at bar, Charles Clark struck Dale Hackbart once with no specific intent to inflict serious injury. The difference in these two fact patterns perfectly describes the difference between assault and battery and reckless misconduct.

Assault and battery is a tort combining the unlawful touching of another with the present intent and ability to inflict serious injury. The tort of reckless misconduct is an intentional act which is performed without an intent to cause particular harm. The Defendant, in *Maes*, evidenced a specific intent to inflict serious injury to the Plaintiff by striking him repeatedly with the pool cue. In the case at bar, Charles Clark admittedly did not intend to seriously injure Dale Hackbart. See *Hackbart, supra*, 435 F.Supp. at 353. Therefore, the case is properly brought under the theory of reckless misconduct.

From the above decision, it is apparent that the District Court applied the appropriate statute of limitations under Colorado law. Petitioners' argument that the Court of Appeals affirmation of the District Court's reasoning on the statute of limitations issue is in conflict with controlling Colorado law evidences a fundamental misunderstanding of Colorado law. The six-year limitations statute is the applicable law governing this cause of action.

2. The Court of Appeals Decision Reflects an Accurate Perception of the Trial Court Proceedings.

Petitioners argue that the Court of Appeals misunderstood the Trial Court proceedings. Petitioners' criticism of the reasoning of the Court of Appeals is unfounded.

Initially, it must be noted that Petitioners' analysis is predicated upon an inaccurate construction of the facts. Petitioners, throughout their Petition for Writ of Certiorari, characterize the striking of Dale Hackbart by Charles Clark as an instinctive or reactive event. The District Court's findings of fact are to the contrary. *Id.* at 353. Game films of the incident clearly show that Charles Clark struck Dale Hackbart from behind several seconds after the two players were effectively out of the play. Indeed, at the moment of impact Dale Hackbart was kneeling on the ground in the end zone watching the play continue upfield. It is from this set of facts that all analysis must follow.

The Court of Appeals viewed the central issue as one of access to the judicial system. The District Court, basing its decision largely upon evidence that was later deemed irrelevant and prejudicial by the Court of Appeals (see evidence discussion pages 9-10, *infra*), ruled that even intentional injuries incurred during a football game should be

outside the framework of the law. *Id.* at 358. The Honorable Richard P. Matsch, speaking for the District Court, likened football to coal mining and railroading insofar as all are inherently dangerous occupations. *Id.* at 357. The District Court held that the game of football is so notoriously violent that players impliedly consent to any and all violent conduct occurring during the course of the game, regardless of the circumstances of its origin. *Id.* at 356. Therefore, according to the District Court's view, injuries arising out of contacts in a football game are not actionable.

The Court of Appeals rejected the District Court's conclusion that such otherwise tortious acts fell outside of the judicial process. The Court of Appeals ruled that there are no principles of law which allow a court to rule out certain tortious conduct by reason of the general roughness of a game or by some difficulty in the administration of the law. *Hackbart, supra,* 601 F.2d at 520.

On the issue of assumption of risk, the Court of Appeals properly held that the decision of the District Court was not supported by the evidence. *Id.* at 520. The evidence adduced at trial supported the proposition that the intentional striking of a player in the head from the rear is not an accepted part of either the official rules or general conduct of the game. The Trial Court's conclusion that Dale Hackbart had assumed the risk of injury was predicated not on competent evidence but on the District Court Judge's reasoning that the game of football was so inherently dangerous that Dale Hackbart must be held to have assumed the risk of such injury.

In conclusion, it is evident that the Court of Appeals did not misunderstand the Trial Court proceedings. The Court of Appeals decision represents an incisive analysis of the fundamental issues. It is from the Court of Appeals' decision that justice may be done.

3. The Court of Appeals Adopted a Proper Standard of Relevance Under Rules 401 and 404, Federal Rules of Evidence.

The Court of Appeals properly ruled that the District abused its discretion by admitting into evidence testimony concerning past conduct of Dale Hackbart that was totally unrelated to the circumstances of the case at bar. This ruling correctly applied Federal Rules of Evidence 401 and 404, which concern the relevancy and admissibility of character evidence. Under Rule 404, proof of a person's character is admissible only when character itself is in issue. Applying the rule, the Court of Appeals properly concluded that unless Dale Hackbart's character was in issue, i.e., unless Dale Hackbart was alleged to have been an unlawful aggressor in the immediate incident, evidence of previous conduct would be irrelevant. *Id.* at 526. The District Court's findings of fact negative any inference that Dale Hackbart was an aggressor in the incident. Therefore, the evidence was properly ruled inadmissible by the Court of Appeals.

The Court of Appeals correctly ruled that the District Court erred in admitting into evidence cumulative episodes of violence unrelated to the case at bar. *Id.* at 525-526. Films were shown which depicted acts of violence between other players and other teams. The films portrayed violent behavior that is illegal under the official National Football League rules.

Petitioners argue that such films are relevant evidence in support of their assumption of risk defense. Respondent, concurring with the Court of Appeals, submits that such evidence is irrelevant; that one cannot equate the awareness of substantial risk with acceptance of such risk. A painstakingly edited cinematic panorama of football vi-

olence, occurring over 10 years of National Football League history has no relevance to the isolated incident at issue in this case.

4. The Case Does Not Present Important Issues of Substantial General Interest.

The issues decided by the Court of Appeals in this case concern the applicability of tort principles to professional football players who cause physical injury to others by engaging in illegal physical contact that is wholly unrelated to recognized play. The Court of Appeals' decision operates to ensure access to the judicial system to those victims of such aggression who would otherwise be without a remedy.

The purpose and effect of the Court of Appeals decision is to reduce aggravated and unauthorized fighting in the athletic arena. This decision cannot, in any way, be said to jeopardize the continuation of football as it is now played. The only foreseeable effect of the Court of Appeals decision will be to discourage professional football players from engaging in unnecessary acts of violence unrelated to the conduct of the game.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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